82 - 1738

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GRENADA BANK, A Mississippi Corporation, DBA "COAHOMA BANK",

Petitioner,

VS.

ROBERT WILLEY, SR., LINDA B. WILLEY, JOHN F. WATSON, JOHN T. JAMES, JR., MARKO PLANNING COMPANY, INCORPORATED, A Tennessee Corporation, and SOUTHERN CONSULTING CORPORATION, A Tennessee Corporation,

Respondents,

VS.

CLARENCE C. DAY and LAWSON F. APPERSON,

Intervenors/Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether application for a writ of execution to a federal court, without reference to historical forms of writs in use in a particular jurisdiction, is a proper pleading, and writ of fieri facias, if chosen by the federal court, is proper process to enforce a judgment in federal court for the payment of money.

II. Whether garnishment is an inadequate remedy for a creditor seeking to charge a limited partnership interest.

III. Whether the Uniform Limited Partnership Act precludes involuntary substitution of limited partners by court order.

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ORDERS BELOW AND JURISDICTION

Petitioner Grenada Bank seeks review of the Order of the United States Court of Appeals for the Fifth Circuit filed on December 20, 1982, which affirmed a judgment of the United States District Court for the Northern District of Mississippi. This opinion has not been officially reported; it may be found in the Appendix to this Petition. The district court's judgment revoked a prior order directing judicial sale of a judgment-debtor's 47% interest in certain limited partnerships. This

judgment has not been officially reported; it may be found in the Appendix to this Petition.

A Petition for Rehearing and Suggestion of En Banc Consideration was denied by Judgment filed January 21, 1983. This decision has not been officially reported; it may be found in the Appendix to this Petition.

This Court has jurisdiction to review the decisions below, pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

(1) MISS. CODE ANN. §13-3-125 (1972):

If the levy be upon personal property the officer shall take the same into his possession and dispose of it according to law.

(2) MISS. CODE ANN. §13-3-131 (1972):

When a defendant in execution shall own or be entitled to an undivided interest in any property not exclusively in his own possession, such interest may be levied on and sold by the sheriff without taking the property into actual possession, and such sale shall vest in the purchaser all the interest of the defendant in such property.

(3) MISS. CODE ANN. §13-3-133 (1972):

Money, banknotes, bills, evidences of debts circulating as money, and any judgment or decree belonging to the defendant, may be taken under an execution or attachment and sold or disposed of according to law, or applied to the payment of the execution or in satisfaction of the judgment in attachment.

(4) MISS. CODE ANN. §13-3-135 (1972):

The purchasers of any chose-in-action, stock, share, interest, judgment or decree of the defendant, sold under execution or attachment, shall become the owner thereof, in the same manner as if it had been regularly assigned to him by the defendant.

(5) MISS. CODE ANN. §79-13-37 (1972), reads in pertinent part as follows:

(1) A limited partner's interest in the partnership is personal property.

(2) A limited partner's interest is assignable.

. . .

(6) MISS. CODE ANN. §79-13-43 (1972), reads in pertinent part as follows:

(1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions and inquiries which the circumstances of the case may require.

. . .

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

. . .

(7) FED. R. CIV. P. 69(a), reads in pertinent part as follows:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought . . . .

STATEMENT OF THE CASE

This appeal arises out of post-judgment efforts of the original plaintiff, Grenada Bank to satisfy its judgment against one of the defendants, Robert Willey, Sr., through execution and judicial sale of that defendant's 47% interest in five Mississippi limited partnerships.

On September 25, 1980, Grenada Bank obtained a judgment against promoters Robert Willey, Sr., John F. Watson, John T. James, Jr., Marko Planning Company, Incorporated, and Southern Consulting Corporation. Prior to that date, Linda B. Willey had been dismissed from the action, and a judgment not taken against her. On June 17, 1981, Grenada Bank obtained a second judgment against Willey and the other promoters.

On July 22, 1981, Grenada Bank made application for a writ of execution against the limited partnership interests of promoter Robert Willey, Sr. On July 23, 1981, the district court judgments were enrolled on the judgment rolls of various Mississippi counties where the limited partnerships had interest, and certified copies of a writ of fieri facias were recorded in the appropriate Chancery Clerks' offices of these counties. Writ of fieri facias was served on Willey on July 29, 1981.

On August 21, 1981, Grenada Bank moved for an Order directing sale of Willey's 47% interest in the partnerships. On August 31, 1981, after hearing on the merits, the district court ordered the U. S. Marshal to conduct a public sale of Willey's 47% interest in the partnerships.

Upon motion by Day and Apperson, and after a hearing, the district court allowed Day and Apperson to intervene and revoked its Order directing judicial sale of Willey's interest, holding that the Intervenors owned 99.7% of each of the five partnerships, that Willey owned only .1% thereof, and that a writ of garnishment, and not a writ of fieri facias, was the proper process for executing upon an interest in a limited partnership.

The Order allowing intervention and revoking the prior order was entered on October 30, 1981; by Order filed November 4, 1981, the previous Order was modified as to technicalities. Grenada Bank hereby seeks review of the Order entered on October 30, 1981, as modified by order filed November 4, 1981.

On November 12, 1981, Grenada Bank filed a Motion for Reconsideration of said orders. The Motion set forth three grounds for reversing said orders and reinstating the prior order directing sale. First, it was argued that a writ of fieri facias was an appropriate writ for the enforcement of a money judgment in federal court, pursuant to Rule 69(a), Federal Rules of Civil Procedure. Second, Grenada Bank contended that its motion for an order directing judicial sale was a proper means of application to the Court for a "charging order", pursuant to § 79-13-41(1), Miss. Code Ann. (1972) (Mississippi version of the Uniform Limited Partnership Act). Third, it was argued that a writ of garnishment is not an adequate remedy for reaching a limited partnership interest, in that it only reaches the right to benefit from profits (cash-flow), not the right to participate in (tax) losses, the most valuable right in a tax-shelter project. Said motion was overruled by Order of the District Court entered on November 16, 1981.

A. Limited Partnerships

Certain facts regarding the limited partnerships are not in dispute. Prior to June 3, 1981, Willey owned a 47% limited interest and a 2% general interest in each of six limited partnerships formed for the purpose of constructing and owning separate apartment projects. These projects were to have been financed under programs of the United States Department of Housing and Urban Development.

One of the partnerships was formed as a Tennessee limited partnership, for the purpose of constructing and owning a project in Tennessee, and the other five limited partnerships were formed as Mississippi limited partnerships for similar

projects in five towns in the State of Mississippi. [1]

On June 3, 1981, a Subscription Agreement and an Amended and Restated Partnership Agreement were executed with respect to each partnership. The terms of these agreements were that Day and Apperson agreed to contribute an aggregate sum of One Million Dollars directly to the respective partnerships, receiving therefrom a 99.7% aggregate interest in each of the partnerships, and reducing the interest of Willey to .1%.

The Subscription Agreement required delivery of the cash contribution in the sum of One Million ($1,000,000.00) Dollars to the Commercial and Industrial Bank as escrow agent. Said funds were delivered to the bank by July 29, 1981, in the form of Four Hundred Thousand ($400,000.00) Dollars in cash and Six Hundred Thousand ($600,000.00) Dollars in negotiable promissory notes. The Subscription Agreement further provided that application for approval of HUD/FHA should be promptly made, and, if Day and Apperson were not approved as partners by HUD/FHA within sixty (60) days after the date of the Subscription Agreement, then the cash contribution "shall" be immediately returned to Day and Apperson, and the Amended Partnership and Subscription Agreements "shall" terminate, be void and of no effect.[2]

1. Grenada Bank attempted execution on Willey's interest in the Tennessee partnership through proceedings in the U.S. District Court for the Western district of Tennessee. That court ruled that a writ of fieri facias was appropriate process, but denied notion for judicial sale on the ground that a transfer of partnership interest had occurred before the issuance of the writ. This ruling is under appeal before the United States Court of Appeals for the Fifth Circuit, Case #81-5913.

2. Paragraph 7 of the Subscription Agreement provides as follows:

7. Simultaneously with the execution of this Agreement, Willey, Murley, BBC, Day and Apperson have executed the Amended Certificate and Restated Agreement of Limited Partnership, a copy of which is attached hereto as Exhibit A ("Amended Partnership"). Day and Apperson will promptly submit to HUD/FHA fully completed HUD/FHA Forms 2530,

Having executed the agreements on June 3, 1981, between June 22, and June 26, 1981, the promoters recorded in the Chancery Clerks' offices of various Mississippi counties, amended certificates of partnership which still reflected a 47% limited partnership interest of Willey, and made no mention of Day and Apperson or of the Subscription Agreements of June 3. On June 23, 1981, at closings taking place at the area offices of HUD/FHA in Jackson, Mississippi, it was certified under oath to said Department of Housing and Urban Development, that Willey owned a 47% interest in the partnerships.

Day and Apperson failed to obtain the approval of the Department of Housing and Urban Development within sixty (60) days of the execution of the Subscription Agreement. Thirty (30) days after the expiration of the sixty (60) day period, and two (2) days after the district court issued its Order directing execution sale of Willey's 47% limited partnership interest, Day and Apperson recorded amended certificates of limited partnership, reflecting their interest pursuant to the June 3 agreements, in the appropriate Chancery Clerks' offices. On October 26, 1981, the Department of Housing and Urban Development approved Day and Apperson as required under the Subscription Agreements.

B. Appeal to the Fifth Circuit

On November 23, 1981, Grenada Bank timely filed a Notice of Appeal with the district court. Oral argument was

2. (con't.)

2013-S and 2417 for approval of Day and Apperson by HUD/FHA as partners, and immediately upon such approval, Murley and Willey will cause the Amended Partnership Agreement to be properly recorded in the Office of the official recorder of each County in each State in which the Partnership is doing business.

If Day and Apperson are not so approved as partners by HUD/FHA within sixty (60) days after the date of this Agreement, then *Southern shall immediately return all of the considerations referred to in Sections 3 and 4 above unto Day and Apperson*, respectively, and the Amended Partnership and this Agreement shall terminate, be void and of no effect. (Emphasis added).

heard before a panel of the United States Court of Appeals for the Fifth Circuit on October 4, 1982. On December 20, 1982, the United States Court of Appeals for the Fifth Circuit affirmed the trial court. The Court held that a writ of fieri facias was not a proper means of charging the interest of a limited partner. Additionally, it held that a court cannot make a creditor a substitute limited partner, and therefore garnishment is the only means of reaching a limited partnership interest. Lastly, the court found that Intervenors, by executing the Subscription Agreements and Amended and Restated Partnership Agreements on June 3, 1981, and by contributing One Million ($1,000,000.00) Dollars directly to the partnership on June 29, 1981, received a 99.7% interest in the partnerships free of any lien.

Grenada Bank then petitioned for Rehearing and made Suggestion for Rehearing En Banc, filed on January 3, 1983. The Petition for Rehearing did not assert that errors of fact had been made by the District Court, but instead argued error of law, as follows:

(A) Proper process to enforce a money judgment in federal court is a writ of execution (fieri facias) pursuant to the explicit language of Rule 69(a), Federal Rules of Civil Procedure. In particular, Petitioner relied upon the use of the word "shall", found in paragraph (a) of said rule. The language of this paragraph provides clearly that other process may be used, but only upon specific direction of the Court.

(B) The decision of the Fifth Circuit failed to determine the date at which the transfer of partnership interest became effective. Grenada Bank contended that by the terms of the Subscription Agreements themselves the transfer of partnership interest did not occur until October 26, 1981, the date on which Intervenors obtained approval by the Department of Housing and Urban Development. Further, it was argued that by the terms of the Subscription Agreements themselves, failure to obtain said approval within sixty (60) days of the date of execution of said agreement, terminated and voided the Partnership Agreements and the Subscription Agreements.

Thus, the district court's Order finding that Willey's interest had been reduced from 47% to .1% was in error.

(C) The Fifth Circuit opinion held that garnishment was the only proper means of charging the interest of a limited partnership, inasmuch as such an interest is intangible property. The opinion incorrectly concluded Mississippi law does not allow for constructive possession of intangible property. Grenada Bank cited various authorities which provide for levy of execution on intangible property, such as judgments, choses-in-action, stocks, shares and interests. Moreover, Grenada Bank cited other authorities in Mississippi providing for constructive seizure of property incapable of being physically possessed, including a Mississippi statute providing for levy and sale by a Sheriff on an undivided interest in any property, with no requirement that the Sheriff take the property into actual possession, and providing that such sale vests in the purchaser all the interest in such property.[3]

The suggestion for en banc consideration incorporated the legal arguments found in the Petition for Rehearing, and, in addition, contended as follows:

(A) The interpretation of Federal Rule of Civil Procedure 69(a) merits en banc consideration, for it is new precedent which will effect executions on money judgments in every federal court.

(B) The holding that garnishment is the only means of reaching a limited partnership interest, will have serious and far-reaching effects on the real estate and securities industries, on tax shelters, on lenders and on the legal profession handling transactions involving limited partnerships. Limited partnerships are investment vehicles most often used entirely as tax

3. Miss. Code Ann. § 13-3-131 (1972). It is noteworthy that the annotators to the Mississippi Code, although not entitled to be cited as authority, nevertheless cross-referenced this statute to Miss. Code Ann. § 79-13-51 (1972), concerning suits against limited partners.

shelters, and most often generating little or no cash-flow. Grenada Bank also argued that limited partnership interests are securities, subject to federal and state securities law. As such, they must be negotiable, and the public must be protected from secret conveyances by unscrupulous promoters, for value to a bonafide purchaser, as in the instant case.

(C) The interpretation of the Mississippi statute regarding transfer of limited partnership interest (voluntary or involuntary), merits en banc consideration. The statute is an enactment of the Uniform Limited Partnership Act. The decision will therefore be precedent in every state which has adopted the Uniform Limited Partnership Act.

On January 21, 1983, the United States Court of Appeals for the Fifth Circuit denied the Petition of Rehearing and the Suggestion for En Banc Consideration.

This Petition seeks a writ of review of the Order below which revoked the prior Order of execution and judicial sale of Willey's limited partnership interests. Such review is justified on the following grounds:

(A) The errors of law raised by this Petition will have far-reaching effects on commerce.

(B) The decision below sanctions such a departure by the district court from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MISCONSTRUES RULE 69(a), FEDERAL RULES OF CIVIL PROCEDURE, AND THEREBY CONFLICTS WITH THE INTENT OF THIS COURT IN ENACTING SAID RULES.

The decision below held that a writ of execution (fieri facias) is not appropriate process for charging an interest in a limited partnership. The court reasoned that an interest in a limited partnership in intangible personal property. Since such property is incapable of being physically possessed, a writ of fieri facias is inappropriate. Instead, garnishment is the proper means of charging such an interest.

Petitioner contended below that Rule 69(a) of the Federal Rules of Civil Procedure governs enforcement of money judgments in federal court. In particular, Petitioner relied on the express language of Rule 69(a) which states: "Process to enforce a judgment for the payment of money *shall* be a writ of execution, unless the court directs otherwise". (Emphasis added).

The decision below apparently construed Petitioner's argument as saying that this sentence makes a writ of execution the *exclusive* means of enforcing a judgment. The court stated that such a reasoning would conflict with the second sentence of paragraph (a) which states:

> "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought..." (Emphasis added).

Petitioner does not contend that garnishment is entirely precluded. However, the express language of the rule, as cited above, states that a writ of execution *shall* be the appropriate process. If a creditor wishes to utilize other process, he must first apply to the court. This is the plain meaning of the language of this rule.

Rule 69 expresses the concern of this Court to continue the modernization of federal practice, as reflected by Rule 1 of the Federal Rules of Civil Procedure.[4] Moreover, it is significant that, just as there is one form of action under these rules, there is just one form of execution. These rules do not provide for extraordinary writs, still allowed by state law.

The second sentence should not be construed to diminish the express language of the first sentence of the rule directing that proper process *shall* be a writ of execution. The first sentence explicitly refers to a specific writ, general in nature, and not to the general process of execution. Otherwise, the language of this sentence, which allows other process only upon court direction, loses its meaning.

No case law has been found construing the language of the first sentence, or the second sentence of this rule. However, *7 Moore's Federal Practice* ¶69.03 concludes that the "unless" clause is not an unlimited source of power to the federal court; instead, a federal court should not ordinarily enforce a money judgment except by a writ of execution. *Moore's* summarily states "[u]nder Rule 69, a writ of execution . . . is the usual process for the enforcement of a final judgment for the payment of money." *7 Moore's Federal Practice* ¶69.03[2] at 69-11.

Lastly, under the liberal pleading rules of the Federal Rules of Civil Procedure,[5] an application for general writ of execution, whatever it be named by the creditor seeking satisfaction of his judgment, should be accepted by the district court without requirements of technical pleadings and without reference to any common law writs still in use in that jurisdiction. Petitioner argued below that its application for writ of

4. Fed. F. Civ. P. 1 states that "[these rules] shall be construed to serve the just, speedy, and inexpensive determination of every action."

5. Fed. R. Civ P. 8 (e)(i) provides in part that "no technical forms of pleading or motion are required." Fed. R. Civ. P. 8 (f) states that "all pleadings shall be construed as to do substantial justice."

execution should be construed as equivalent to an application for a charging order. This argument seems expecially persuasive inasmuch as the procedure for applying for a charging order under the Uniform Limited Partnership Act, codified by Mississippi Law at Miss. Code Am. §79-3-43 (1972) does not state to any certainty the proper procedure to be followed.

Commentators have expressed numerous concerns for the inaccuracy of reasoning and uncertainties in the law involving the right of a creditor to attach or levy execution on an interest in a partnership. One source comments that "the dearth of cases and lack of explanation in secondary reference material are indicative of the inadequate definition of charging orders." *See* E. Axelrod, *The Charging Order — Rights of a Partner's Creditor*, 36 Ark. L. Rev. 81, 81(1982); Note, *Charging Orders Under the Uniform Partnership Act*, 9 Wyo. L. Rev. 112, 121 (1955); Note, *The Power of a Partner's Individual Creditor to Reach Partnership Property*, 27 Colum. L. Rev. 436(1927).

In conclusion, Petitioner urges that clear precedent is needed for proper construction of Rule 69(a) in order to resolve uncertainties. Petitioner urges the court to rule that the plain language of Rule 69(a) simplifies and modernizes federal practice, and that henceforth application for a writ of execution, without reference to obsolete and antique forms of historical writs, is proper pleading and writ of fieri facias if chosen by the court, is proper process to enforce a judgment in federal court for the payment of money. The rule allows for definition of time, place, etc. requirements to be defined by state procedure.

A holding by this Court, that a writ of execution, as used by Petitioner below, was an appropriate writ, results necessarily in reversing and remanding the case.

II. LIMITING A CREDITOR'S REMEDY TO GARNISHMENT INTERFERES WITH SUBSTANTIAL JUSTICE AND HAS ADVERSE EFFECTS ON COMMERCE.

The decision below held that garnishment was the only proper means of charging an interest in a limited partnership. The Fifth Circuit incorrectly concluded that Mississippi law

does not allow for constructive possession of intangible property. This is clear error. In support, Petitioner cites the following authorities:

(a) Various Mississippi statutes provide specifically for levy by execution or attachment on such intangibles as money, bank notes, judgments and the like. The statutes do not mention garnishment. They further provide that purchasers of intangibles such as choses-in-action, stocks, shares, interests, or judgments, sold under execution or attachment, become the owner thereof as if the same had been regularly assigned by the Defendant. *See* Miss. Code Ann. §13-3-133 (1972); Miss. Code Ann. §13-3-135 (1972).

(b) It is true that a Mississippi statute state that upon levy of execution on personal property, the officer is to take the property into his possession and dispose of it according to law. Miss Code Ann. §13-3-125 (1972). This statute, however, has been construed by the Mississippi Supreme Court as providing also for constructive seizure. *Industry Sales Corp. v. Reliance Manufacturing Company,* 243 Miss. 463, 138 So. 2nd 484 (1962).

(c) But another Mississippi statute explicitly provides that where a Defendant owns or is entitled to an undivided interest in property, his interest may be levied on and sold by the Sheriff without taking the property into actual possession, and the sale vests in the purchaser all the interest of the Defendant in such property. Miss. Code Ann. § 13-3-131 (1972). The annotators of the Mississippi Code have cross-referenced this statute to §79-13-51, which specifically concerns suits against limited partners.

> Thus in Mississippi there is no requirement that the property be capable of being physically possessed, and the analysis of the Fifth Circuit is not in accord with Mississippi law. The above-described Mississippi statutes, and caselaw, allow for constructive possession of intangible property, and that a writ of execution is therefore a proper means of charging an interest of a limited partner.

The Fifth Circuit relied for its holding regarding garnishment of the case of *Simmons-Belk, Inc., v. May,* 283 So. 2d 592 (Miss. 1973). *Simmons-Belk* can be distinguished in its facts from the instant case. However, a narrow reading of the *Simmons-Belk* decision is appropriate in this case, for such a reading upholds Petitioner's position. The concern of the Mississippi Supreme Court in *Simmons-Belk* was to maintain the negotiability of promissory notes. Limited partnership interests are securities, subject to federal and state securities law; as such, they must be negotiable, and investors must be protected from secret conveyances, by unscrupulous promoters, as in the instant case. Thus the concern of the Mississippi Supreme Court for the protection of commerce and the public is apparently not shared by the Fifth Circuit, whose decision effectively destroys negotiability of limited partnership interests.

The decision below will have a far-reaching effect on every jurisdiction which has adopted the Uniform Limited Partnership Act. It will make real estate securities, based on limited partnerships, worthless as collateral, and therefore unmarketable. If the Fifth Circuit's decision stands, there is no legal means by which an investor could safely acquire a limited partnership interest without risk of losing his entire investment, by later finding out that the interest had previously been secretly conveyed for value to someone else.

III. THE HOLDING THAT A COURT CANNOT MAKE A CREDITOR A SUBSTITUTE LIMITED PARTNER IS AN ERROR OF LAW AFFECTING EVERY JURISDICTION.

The decision belows holds that a provision of the

Uniform Limited Partnership Act, codified in Mississippi at Miss. Code Ann. §79-13-37 (1972), denies federal courts the power to make an assignee of a limited partnership a substitute partner. The provisions of the Uniform Limited Partnership Act concerns voluntary transfers only. By other Mississippi statutes, a court is expressly given the power for execution and sale of such interests, and for substitution of such interests. *See* Miss. Code Ann. §13-3-135 (1972); Miss. Code Ann. §13-3-131 (1972). Moreover, a federal court has the equitable power for involuntary transfer of interests. Nobody can argue that a court of equity does not have the power to convey little to any property from one person to another by order, and without the consent or without any participation by the transferor or transferee.

Finally, the benefits of a limited partnership interest would accrue to a limited partner substituted court order, and such benefits would be substantially greater that those reached by garnishment. A judgment creditor thus should be able to choose. If he wishes to reach cash-flow only, he shoudl proceed by garnishment, upon direction of the court. If he wishes to reach more than cash flow, for instance tax-related benefits, he should proceed by execution and sale.

The central question of this case is whether execution and sale of a limited partnership interest is allowed by law. Petitioner contends that it is allowed, that the writ of fieri facias as used below is an appropriate process, and that the writ was issued and served prior to effective transfer of partnership interest.[6]

6. The Fifth Circuit failed to make a finding as to when the transfer of interest became effective. If this court finds that a writ of fieri facias was appropriate process, then such a factual determination as to when the transfer took place will become necessary on remand.

CONCLUSION

For the reasons stated, the questions presented merit review by this Court by grant of a writ or by summary disposition.

Respectfully submitted,
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21 April, 1983

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GRENADA BANK, A Mississippi Corporation, d/b/a "COAHOMA BANK",
Judgment Creditor-Appellant,

vs.

No. 81-4477

ROBERT WILLEY, SR.,
LINDA B. WILLEY,
JOHN F. WATSON,
JOHN T. JAMES, JR.,
MARKO PLANNING COMPANY, INCORPORATED, A Tennessee Corporation,
SOUTHERN CONSULTING CORPORATION, A Tennessee Corporation,
Judgment Debtors-Appellees

APPEAL FOR THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI,
DELTA DIVISION

HONORABLE L. T. SENTER, JR., JUDGE

APPELLANT'S PETITION FOR REHEARING
(Filed January 3, 1983)

Appellant hereby petitions this honorable court for rehearing, to bring attention of the panel to the following errors of law in the opinion rendered:

1. *USE OF GARNISHMENT.* Appellant does not assert that Rule 69(a) of the Federal Rules of Civil Procedure precludes the use of garnishment for enforcement of a judgment for money damages. Instead, Appellant takes the position

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4477

GRENADA BANK, A Mississippi Banking Corporation, d/b/a "COAHOMA BANK", ... *Plaintiff-Appellant,*

vs.

ROBERT WILLEY, SR., ET AL ..... *Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion December 20, 5 Cir., 1982, __F.2d__).
(Filed January 21, 1983)
(excerpt)

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ ALBERT TATE, JR.

ALBERT TATE, JR.

ishment, but must do so by specific direction of the court. Otherwise, a writ of execution is the proper process.

2. *TRANSFER OF PARTNERSHIP INTEREST.* The decision of the Court failed to determine the legality of the transfer of partnership interest from Mr. Willey to investors Day and Apperson. In particular, the decision did not determine at which date the transfer of interest became effective. Appellant contends the transfer of partnership agreement could not have been effective as of the date of the subscription agreement and amended and restated partnership agreement on June 3, 1981, by virtue of the fact that Mr. Day and Mr. Apperson had not yet completed their capital contribution to the partnerships, and the agreement was contingent upon such action. Furthermore, both Defendants and intervenors should be estopped from contending that the June 3, 1981 date was the effective date of transfer, by virtue of certification to the Department of Housing and Urban Development that Defendant Willey owned a 47% interest in the partnership on June 23, 1981.

The subscription agreement was contingent not only upon completion of capital contribution but also upon approval by the Department of Housing and Urban Development of investors Day and Apperson. As the Court found in its decision, such approval did not occur until October 26, 1981, well after Appellant had recorded its judgment and Fieri facias was issued. By the terms of their own Subscription Agreement, the partnership transfer was thus not effective until October 26, 1981. The District Court thus was in error revoking its order directing the sale of Mr. Willey's 47% interest in the partnerships.

3. *WRIT OF EXECUTION.* The Court's decision concludes that garnishment is the *only* proper means of charging the interest of a limited partnership, and that a writ of fieri facias may not be used to take possession of an interest in intangible property. Appellant does not herein re-argue the law

that, by the language of the rule itself, Rule 69 mandates that the proper process to enforce a judgment in federal court for the payment of money is a writ of execution. The rule provides federal courts with the power to direct otherwise, but a party should not do so without such court direction. Appellant further contends that the purpose of the language of Rule 69 is to continue the modernization of the Federal Rules of Civil Procedure, just as the rules do not provide for extraordinary writs still allowed by State law. The purpose of the second sentence of Rule 69(a) is to make clear that the procedure which is proper for use in such executions, is the practice and procedure of the State in which the District Court is held. This sentence should not be construed to diminish the express language of the rule directing that proper process "shall" be a writ of execution. The language "writ of execution" is an explicit reference to a specific writ, not the general process of execution. No case law has been found construing the language of the first sentence or the second sentence of Rule 69(a). However, 7 *Moore's Federal Practice* ¶69.03 [1] discusses the history of Rule 69, and the Committee's belief that a series of federal rules on supplementary proceedings would be burdensome and unnecessary in as much as adequate provisions are found in State law. Furthermore, this authority concludes that the State proceedings are adequate for use under the Federal Rules of Civil Procedure, "since only one civil action is contemplated by the Rules, and Rule 69 covers the enforcement of any money judgment therein". *Moore's* concludes that the "unless" clause is not an unlimited source of power to the federal court. Instead, a federal court should not enforce a money judgment except by a writ of execution. *Moore's* summarily states "Under Rule 69, a writ of execution. . . is the usual process for the enforcement of a final judgment for the payment of money". 7 *Moore's Federal Practice* ¶69.03 [2] at 69-11. Thus Appellant takes the position that under Rule 69(a), a federal court is not precluded from the use of garn-

previously presented, but strongly urges the Court that Mississippi law does allow for constructive possession of intangible property. In particular, Appellant cites the following authorities:

(a) §13-3-133 M.C.A. (1972) as amended, provides that "money, bank notes, judgments and the like" may be levied on by "execution or attachment". Said statute does not mention garnishment.

(b) §13-3.135 M.C.A. (1972) as amended, provides that a purchaser of any "chose in action, stock, share, interest, judgment . . ." sold under "execution or attachment", shall become the owner thereof, "in the manner as if it had regularly been assigned to him by the Defendant." Said statute does not mention garnishment.

(c) §13-3-125 M.C.A. (1972), as amended, provides that a levy of execution upon personal property directs the officer to take the property into his possession and dispose of it according to law. This statute has been construed by the Mississippi Supreme Court as providing for constructive seizure. *Industry Sales Corp. vs. Reliance Manufacturing Company,* 243 Miss. 463, 138 So.2d 484 (1962). Thus there is no requirement that the property be capable of being physically possessed.

(d) §13-3-131 M.C.A. (1972), as amended, provides that where a defendant owns or is entitled "to an undivided interest in any property, such interest may be levied on and sold by the Sheriff without taking the property into actual possession, and such sale shall vest in the purchaser all the interest to the defendant in such property". Although the annotaters of the Mississippi Code are not entitled to be cited as authority, they have made cross-reference under this statute to § 79-13-51, concerning suits against limited partners.

Thus, Appellants contend that just because the Sheriff cannot "physically possess" an interest in a limited partnership

does not mean that a writ of fieri facias is an improper writ under Mississippi law. Indeed, writs of execution are specifically provided by Mississippi statute as shown above, for intangibles, regardless of *Simmons-Belk, Inc. vs. May,* 283 So.2d 592 (Miss. 1973).

4. *SIMMONS-BELK DECISION.* The *Simmons-Belk, Inc. vs. May,* 283 So.2d 592 (Miss. 1973) decision was highly relied upon by both the District Court and this Court. Appellant contends that the *Simmons-Belk* decision should be very narrowly read. It is noteworthy that this decision has not been cited as authority even one time in any reported decisions. It is contrary to certain Mississippi Statutes, as shown above, and the decision itself makes clear that the Mississippi Supreme Court reached its holding in the interest of maintaining the negotiability of promissory notes. *Simmons-Belk* at 593-94. In order to reach its conclusions, the Mississippi Supreme Court was required to disregard statutory definitions of property, as well as statutes clearly providing for writ of execution on intangible property. Appellant contends that a narrow reading of the *Simmons-Belk* decision is necessary, thus under the facts of the instant case, a writ of fieri facias was appropriate, and that the judgment lien therefore attached at the time of service of the writ. Furthermore, the Court clearly erred in its decision by holding that garnishment is the only proper means of charging the interest of a limited partnership. If *Simmons-Belk* is worthy of citation as authority, it is because it reflects the concern of the Mississippi Supreme Court in maintaining the negotiability of promissory notes. This Court should maintain the same concern, for affirming the District Court in the instant case, has the same negative effect on limited partnership interests which the Mississippi Supreme Court sought to avoid for promissory notes: this decision destroys the negotiability of limited partnership interests. This will have a

far-reaching effect on every jurisdiction in the country which has adopted the Uniform Limited Partnership Act. It will make real estate securities, based on limited partnerships, worthless as collateral, and therefore unmarketable. If this Court's decision stands, there is no legal means by which an investor could safely acquire a limited partnership interest without risk of losing his entire investment by finding out later that the interest had previously been secretly conveyed, for value, to someone else.

5. *ASSIGNMENT OF INTEREST.* Appellant has strongly urged the Court to consider the limited and inadequate remedy that a writ of garnishment offers to a creditor of a person owning an interest in a limited partnership. The Court's decision holds that Appellant's proposed remedy, execution and sales, is contrary to Mississippi law, relying on § 79-13-37 M.C.A. (1972).

Mississippi specifically provides for execution and sale of such interests, as shown above, § 13-3-135 M.C.A. (1972); § 13-3-131 M.C.A. (1972). The Mississippi Limited Partnership Act specifically provides that an interest is assignable § 79-13-37 M.C.A. (1972). A court thus has the equitable power to assign an interest. This statute further provides a means by which an assignee may become a substitute limited partner, by voluntary transfer. These provisions clearly do not apply to involuntary transfers, such as by court order. Involuntary transfers are governed by Mississippi execution statutes such as § 13-3-131 M.C.A. (1972) and § 13-3-135 M.C.A. (1972).

Appellants contend that many of the benefits of a limited partnership would accrue to an assignee by court order. These benefits would be greater than those available by garnishment. A judgment creditor thus should be able to choose. If he wishes to reach cash-flow only, he should proceed by garnishment, upon direction of the court. If he wishes to receive other benefits, not the least of which are

tax-related benefits, he should proceed by execution and sale.

It is unlikely after a court ordered assignment (by judicial sale), that the other members would not consent to the assignee becoming a substitute limited partner, and certainly if the certificate empowers the assignor with the right to make an assignee a limited partner, the Court could do so. Whether an assignee becomes a substitute limited partner, is a collateral issue, however.

The central question is whether execution and sale of a limited partnership interest in Mississippi is allowed by law. Appellant contends that it is allowed, that the writ of fieri facias was an appropriate process, and that the writ was issued prior to completion of transfer of the partnership interest. Thus the decision of the District Court should have been reversed and remanded, not affirmed.

CONCLUSION

For the above reasons, Appellant respectfully petitions this Court for Rehearing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4477

GRENADA BANK, A Mississippi Banking
Corporation, d/b/a
"COAHOMA BANK", ... *Judgment Creditor-Appellant,*

vs.

ROBERT WILLEY, SR.,LINDA B. WILLEY,
JOHN F. WATSON, JOHN T. JAMES, JR.,
MARKO PLANNING COMPANY, INCORPORATED,
A Tennessee Corporation and
SOUTHERN CONSULTING CORPORATION,
A Tennessee Corporation, ... *Judgment Debtors-Appellees.*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION
HONORABLE L. T. SENTER, JR., JUDGE

APPELLANT'S SUGGESTION OF
EN BANC CONSIDERATION
(Filed January 3, 1983)
(excerpt)

ARGUMENT

I. *Under the Federal Rules of Civil Procedure, a writ of execution is appropriate process for enforcement of a final judgment in federal court for the payment of money, regardless of State law.*

This issue is raised by the language of Rule 69(a) of the Federal Rules of Civil Procedure which states: "Process to enforce a judgment for the payment of money shall be a writ of

execution, unless the Court directs otherwise. The procedure on execution, in proceeding supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State in which the District Court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable". The panel decision concludes flatly that Rule 69 does not preclude the use of garnishment for enforcement of a judgment. Appellant has contended throughout the proceedings below that the language of Rule 69(a) clearly describes a writ of execution, and not execution as a general concept, as an appropriate writ for enforcement of a judgment for money damages. Appellant does not contend that garnishment is entirely precluded. Garnishment is an acceptable and appropriate writ for enforcement of money judgment, upon court direction. This is the plain meaning of the language found in Rule 69(a). The second sentence of the rule does not conflict with Appellant's reading of Rule 69(a). It merely states that State procedure on execution shall be followed. Thus, for a judgment in Federal Court in the State of Mississippi, the proper specific process is a writ of execution, or fieri facias, unless the Court directs otherwise. Appellant made use of a writ of execution pursuant to Rule 69(a) in order to collect monies due it from Defendant as a result of the judgment from the District Court.

The Federal Rule in question specifies that the proper process "shall" be a writ of execution. Consequently, Appellant requested that a writ of execution be issued on the limited partnerships of Defendant Robert Willey, Sr. The District Court issued the writ, but later decided that a writ of execution is an improper process for intangible property. The fifth circuit panel decision affirmed this holding.

This issue merits consideration en banc because it involves a significant issue of interpreting Rule 69(a). To

Appellant the language of Rule 69(a), both sentences one and two, seems abundantly clear. Yet such construction is at conflict with the District Court, who interprets the second sentence to be authoritative.

If Rule 69(a) is interpreted to mean execution as a general concept, rather than as a specific writ, then there needs to be a decision so holding. *7 Moore's Federal Practice* ¶ 69.03 [2] agrees with the position Appellant has taken herein. The public interest in proper interpretation of this rule is of paramount importance, for it touches on collections of money judgments in every Federal Court in this nation, including the fifth circuit.

II. *A Writ of Garnishment is not an effective means for reaching a Limited Partnership Interest.*

The decision of the panel has held that the appropriate writ for enforcement of a money judgment in the case at hand was a writ of garnishment. Appellant contends that a writ of garnishment is not the only means for reaching a limited partnership interest, and that it is highly ineffective. Therefore, a creditor of a person owning a limited partnership interest should not have his remedies limited to garnishment. Garnishment only reaches the cash-flow involved in a limited partnership venture. It does not allow the creditor to share in tax losses. Limited partnerships are an investment device which is pursued by most investors because of the tax shelters available, not for the cash-flow. Moreover, it should be noted that limited partnership interests are securities, subject to federal and state securities laws. As such, they must be negotiable, and investors must be protected from secret conveyances, for value to a bonafide purchaser, as in the instant case.

This issue has far-reaching implications for the real estate industry as a whole, for tax shelters, for the banking industry, and for the legal profession engaged in closing transactions involving limited partnerships. To allow the decision of the panel to stand, will not only result in inequity to Appellant, but will enable unscrupulous promoters to engage in

limited partnership ventures free from interference by either courts or judgment creditors.

III. *The Uniform Limited Partnership Act does not preclude involuntary subscription of limited partners by Court order.*

The panel decision holds that a provision of the Uniform Limited Partnership Act, codified in Mississippi at § 79-13-37 M.C.A. (1972) denies Federal Courts the power to make an assignee of a limited partnership a substitute partner. Appellant contends that this ruling is an error of law, that the Uniform Limited Partnership Act, and this provision in particular, concerns voluntary transfers only.

The importance of this issue is not limited to the application of the Mississippi statute in question. It instead concerns every State which has enacted the Uniform Limited Partnership Act, involving almost 90% of the States as well as the District of Columbia and the Virgin Islands. *See 60 Am. Jur. 2d.*, Partnership § 371 thus the interest of the public in this issue is of manifest importance. Moreover, this issue has further implications for the securities industry, the real estate industry, tax shelter devices, and for all professionals engaged in business planning and development.

GRENADA BANK, a Mississippi banking corporation, d/b/a "Coahoma Bank",
Plaintiff-Appellant,

v.

Robert WILLEY, Sr., et al.,
Defendants-Appellees.

No. 81-4477

United States Court of Appeals,
Fifth Circuit
(Opinion)
(Filed Dec. 20, 1982.)

Appeal from the United States District Court for the Northern District of Mississippi.

Before GARZA, TATE and WILLIAMS, Circuit Judges.

GARZA, Circuit Judge:

This appeal arises out of Grenada Bank's attempt to satisfy its judgment against Robert Willey through the execution and sale of a 47% interest in five Mississippi partnerships. On August 31, 1981, the district court ordered the U. S. Marshal to conduct a public sale of Mr. Willey's 47% interest in partnerships. Upon motion by Mr. Day and Mr. Apperson, appellees, the court allowed said parties to intervene and after a hearing

revoked its order directing a judicial sale of Mr. Willey's interest. Grenada Bank contends the court erred in revoking the order.

On September 25, 1980, Grenada Bank obtained a judgment against Robert Willey and the other promoters: Linda B. Willey, John F. Watson, John T. James, Jr., Marco Planning Co., and Southern Consulting Corporation. Prior to June 3, 1981, Mr. Willey owned a 47% limited interest and a 2% general interest in each of six limited partnerships which had been formed for the purpose of constructing and owning separate apartment projects. On June 3, 1981, the projects were suffering various financial problems. A Subscription Agreement and an Amended and Restated Partnership Agreements were executed whereby Mr. Day and Mr. Apperson, appellees, agreed to contribute a total of $1,000,000 directly to the respective partnerships. As a result, Day and Apperson received a 99.7% aggregate interest in each of the partnerships while Mr. Willey's interest was reduced to .1%.

On June 17, 1981, Grenada Bank obtained another judgment against Mr. Willey and the other promoters for $104,833.08. Between June 22 and June 26 the promoters recorded, in the Chancery Clerk's offices of various Mississippi counties, amended certificates of partnership reflecting a 47% limited partnership interest of Mr. Willey. On June 23, 1981, it was certified to the Department of Housing and Urban Development that Mr. Willey owned a 47% interest in the partnership. On June 29, 1981, Day and Apperson completed their capital contribution to the partnerships by contributing $400,000 in cash and $600,000 in negotiable promissory notes.

On July 22 Grenada Bank began the process of selling Mr. Willey's interest by making application for writ of execution. On June 23, 1981, the district court judgment was enrolled on the judgment rolls of various Mississippi counties where the limited partnership had interest, and certified copies of the writs of fieri facias were recorded in the appropriate Chancery Clerk's offices of these counties. Writ of fieri facias was served on Mr. Willey on July 29. On August 21 Grenada Bank moved

for an order directing sale of a 47% interest in the partnership. On August 31, 1981, the district court ordered a judicial sale of a 47% interest in each of the partnerships allegedly belonging to Mr. Willey.

On September 2, 1981, Day and Apperson became aware of the judgment against Mr. Willey and recorded amended certificates of limited partnership, reflecting their interest pursuant to the June 3 Subscription Agreement, in the appropriate Chancery Clerk's offices. On October 26, 1981, the Department of Housing and Urban Development approved Day and Apperson as required under the Subscription Agreement.

On October 30, 1981, the trial court authorized Day and Apperson to intervene. The district court held that the execution of the June 3, 1981, Subscription Agreement reduced Mr. Willey's interest in the partnership to .1%. Therefore, on August 31, 1981, when the sale of Mr. Willey's 47% interest was ordered Mr. Willey only had a .1% interest in the partnership. The district court, consequently, revoked the prior order directing the United States Marshal to conduct a public sale of Mr. Willey's 47% interest in the Mississippi limited partnerships. Judge Senter went on to find that since Mr. Willey's interest in the partnership was an intangible personal property interest a writ of garnishment, and not a writ of fieri facias, must be used to reach the property.

Grenada Bank raises two issues on appeal: (1) whether the district court erred in holding that the transfer of partnership ownership to Day and Apperson cut off Grenada Bank's ability to reach the 47% interest in the partnership previously owned by Mr. Willey; and (2) whether the district court erred in holding that garnishment, and not a writ of fieri facias, is the proper means of reaching a limited partnership interest. We find the district court did not err.

Mr. Willey's interest in the partnership was personal property. Miss. Code Ann. § 79-13-37. *See Myrick v. Second National Bank of Clearwater,* 335 So.2d 343, 344 (Fla. Dist. Ct. App.2d Dist. 1976). The interest is intangible personal

property since an interest in a partnership is a nonphysical asset which exists only in connection with the assets or value of the partnership. "The lien of an enrolled judgment does not attach to intangible property." *Simmons-Belk, Inc. v. May*, 283 So.2d 592 (Miss. 1973). The lien attaches when the writ, subjecting the intangible property to the judgment, is served. *See id.* at 594. Thus, the lien could not possibly have attached until July 29, 1981, when the writ was served on Mr. Willey.[1] Day and Apperson, by executing the Subscription Agreement and Amended and Restated Partnership Agreements on June 3, 1981 and by contributing $1,000,000 directly to the partnerships on June 29, 1981, received a 99.7% interest in the partnerships free of any lien. The district court, therefore, correctly revoked its order directing the sale of Mr. Willey's 47% interest in the partnerships.

Section 79-13-43 of Mississippi Code Annotated provides:

> (1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; . . . .

The question before this court is whether a writ of garnishment or a writ of fieri facias is the proper means of charging the interest of the limited partner.

A writ of fieri facias directs the sheriff to take physical possession of the property. *See* D. Doobs, Remedies 10 (1978). The sheriff cannot physically possess an interest in a limited partnership. A writ of fieri facias, therefore, is not a proper means of charging the interest of a limited partner.

1. The writ served on July 29, 1981, was a writ of fieri facias. As will be shown below, a writ of fieri facias is not a proper means of reaching an interest in a limited partnership. The lien, therefore, could not have attached on July 29, 1981.

In executing a writ of garnishment the sheriff does not take physical possession of the property. *First National Bank of Hattiesburg v. Ellison,* 135 Miss. 42, 99 So. 573, 574 (1924). Garnishment is the process by which assets due a judgment debtor by third persons are attached. *Id.* Here the asset due is Mr. Willey's interest in the limited partnership; the judgment debtor is Grenada Bank; and the third persons are the limited partnerships. Grenada Bank could have garnished Mr. Willey's interest in the limited partnerships by serving the partnerships. Garnishment, consequently, is the proper means of charging the interest of the limited partnership. *See Simmons-Belk, Inc. v. May,* 283 So.2d 592, 594 (Miss. 1973); 6 Am.Jur. *Attachment and Garnishment* § 187.

Grenada Bank's brief presents several arguments against garnishment. Appellant asserts that Rule 69(a) of the Federal Rules of Civil Procedure precludes the use of garnishment for enforcement of a judgment for money damages. Rule 69 does not preclude the use of garnishment for enforcement of a judgment.[2] *See Juneau Spruce Corporation v. International Longshoremen's and Warehousemen's Union,* 131 F.Supp. 866, 869 (D.Hawaii 1955).

Grenada Bank contends that a writ of garnishment is an adequate remedy in that it only reaches the right to receive cash

2. Appellant relied on the first sentence of Rule 69 which states: "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise." Appellant argues that this sentence makes a writ of execution the exclusive means of enforcing a judgment. Such a reading would conflict with the next sentence which states:

> The procedure on execution, in proceedings supplementary to and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Inasmuch as no applicable federal statute governs, the practices and procedures of Mississippi must be used in executing the judgment. A writ of execution cannot be the exclusive means of enforcing a judgment since Mississippi practice and procedure provides for garnishment.

flow and does not allow the creditor to share in tax losses. In essence, appellant argues that a creditor of a limited partner must be afforded a remedy which will allow the creditor to become a substitute limited partner. Mississippi Code § 79-13-37 provides that a limited partner's interest may be assigned, but the assignee is only entitled to reach the share of the profits or other income or return of contribution to which the assignor would be entitled; an assignee becomes a substitute partner only if all members of the limited partnership agreement gives the assignee that right. The district court could thus assign a creditor the right to reach the share of the profits or other income or return of contribution to which the debtor would be entitled. The district court, however, could not make the creditor a substitute limited partner. The appellant's proposed remedy, therefore, would be contrary to Mississippi law.[3]

All of Grenada Bank's contentions are without merit.

AFFIRMED.

3. In oral arguments and by supplemental letter Grenada Bank discussed a companion case pending in the United States Court of Appeals for the Sixth Circuit. The case arose out of attempted execution on the same final judgment as the case at hand, and a final order was issued in the United States District Court for the Western District of Tennessee. The district court, in its Order on Motion for Order Directing Execution Sale, noted that "in Tennessee the execution used to enforce a collection of a money judgment or decree is called fieri facias." The court's order was not based on this statement. The court's denial of the creditor's motion for execution sale was based on the fact that the transfer of partnership interest occurred before the issuance of the writ. Most importantly the court was interpreting Tennessee law and not Mississippi law. We, therefore, do not find this case persuasive.

A-5

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4477

GRENADA BANK, A MISSISSIPPI CORPORATION, DBA "COAHOMA BANK"
Judgment Creditor - Appellant,

vs.

ROBERT WILLEY, SR., LINDA B. WILLEY, JOHN F. WATSON, JOHN T. JAMES, JR., MARKO PLANNING COMPANY, INCORPORATED, A TENNESSEE CORPORATION, and SOUTHERN CONSULTING CORPORATION, A TENNESSEE CORPORATION,
Judgment Debtors - Appellees.

Appeal from the United States District Court for the Northern District of Mississippi, Delta Division
Honorable L. T. Senter, Jr., Judge

Appellant's Brief

(Filed February 18, 1982)
(excerpt)

SUMMARY OF ARGUMENT

The District Court's decision is based upon the conclusion of law that the legal principles stated in *Simmons-Belk, Inc. v. May*, 283 So.2d, 592 apply in the instant case.

In that 1973 decision of the Mississippi Supreme Court, it was held that the lien of an enrolled judgment does not attach to intangible property, such as vouchers for the payment of money and the right to receive money until service of a Writ of Garnishment or other appropriate Writ.

3

The District Court is of the opinion that a Writ of "Fieri Facias" is neither a Writ of Garnishment nor is it another "Appropriate Writ".

It is respectfully submitted that the District Court is in error on the following grounds:

(1) The 1973 case which the District Court relied is no authority here. It involves execution under State Court judgment and State procedure, whereas the instant case involves execution under Federal Court judgment and Federal procedure.

(2) The 1973 case is based upon different facts. It involves execution upon a promissory note, whereas the instant case involves execution upon a limited partnership interest.

(3) The 1973 case is based upon a principle of law established in a prior decision of the Mississippi Supreme Court in 1916. Subsequent enactment of the Uniform Commercial Code in 1968 and the Uniform Limited Partnership Act in 1964 have made the 1916 legal principle obsolete and irrevelant.

(4) The District Court's decision would have a far-reaching adverse effect on the marketability of real estate securities, severely restricting such marketability.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GRENADA BANK, a Mississippi
Banking Corporation, d/b/a
"COAHOMA BANK",

Plaintiff,

vs. CIVIL ACTION NO. DC80-32-LS-O

ROBERT WILLEY, SR., ET AL,

Defendants.

NOTICE OF APPEAL
(Filed November 23, 1981)

Notice is hereby given that Plaintiff hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgments entered in this action on October 30, 1981 and November 2, 1981.

This the 19th day of November, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GRENADA BANK, A Mississippi Corporation, d/b/a COAHOMA BANK, *Plaintiff,*	)	
v.	)	*NO. DC 80-32-LS-P*
ROBERT WILLEY, SR., et al., *Defendants.*	)	

ORDER OVERRULING MOTION FOR RECONSIDERATION OF ORDERS DATED NOVEMBER 2, 1981, AND OCTOBER 30, 1981 (Filed November 16, 1981)

This cause came on to be heard on plaintiff's motion for reconsideration of prior orders of this court dated November 2, 1981, and October 30, 1981, and the court having considered this motion, together with the memorandum of authorities submitted therewith, finds that the motion is not well taken and should be overruled.

ORDERED:

That plaintiff's motion for reconsideration of orders dated November 2, 1982, and October 30, 1981, be and the same is hereby OVERRULED.

This 12th day of November, 1981.

/ S /

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GRENADA BANK, a Mississippi Corporation, d/b/a/COAHOMA BANK, *Plaintiff,*	)	
VS.	)	CIVIL ACTION NO. DC80-32-LS-P
ROBERT WILLEY, SR., et.al., *Defendants.*	)	

MOTION FOR RECONSIDERATION OF ORDER DATED NOVEMBER 2, 1981 AND OF ORDER DATED OCTOBER 30, 1981
(Filed November 12, 1981)

Comes now the Plaintiff, Grenada Bank, and respectfully moves the Court to reconsider its Order dated November 2, 1981, correcting and clarifying its Order of October 30, 1981, or order a new trial on the grounds set forth in Plaintiff's Memorandum of Authorities filed concurrently herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GRENADA BANK, a Mississippi Corporation, d/b/a COAHOMA BANK, *Plaintiff,*	)	
VS.	)	CIVIL ACTION NO. DC80-32-LS-P
ROBERT WILLEY, SR., et al., *Defendants.*	)	

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DATED NOVEMBER 2, 1981 AND OCTOBER 30, 1981
(Filed November 12, 1981)
(excerpt)

It is respectfully submitted that the Court is in error on the following grounds.

1. Rule 69 (a), FRCP, has effectively abolished all common law writs for the enforcement of judgments in Federal Courts, allowing only one method of execution. The rule reads in part as follows:

> "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the Court directs otherwise".

The Court's discretion to deviate from this rule is limited.

Moore's Federal Practice, 69-10.

2. A writ of garnishment is an inadequate remedy, reaching only the right to receive payment of money. A limited

partnership interest, in addition to the right to receive a share of the cash-flow, also includes the right to share in the tax-losses. This, latter right, is the most valuable right in a tax-shelter project, like the instant Section 8 (Housing Act of 1974) projects. A writ of garnishment does not reach the right to participate in "losses".

3. Plaintiff, by filing his motion for order directing judicial sale, effectively applied to the Court for a "charging order" pursuant to § 79-13-43 (1), M.C.A. The statute reads in part as follows:

> "On due application to a Court of competent jurisdiction by any creditor of a limited partner, the Court may charge the interest of the indebted limited partner...".

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GRENADA BANK, a Mississippi Corporation, d/b/a COAHOMA BANK	)	
Plaintiff,	)	
vs.	)	NO. DC 80-32-LS-O
ROBERT WILLEY, SR., et al.,	)	
Defendants.	)	

ORDER
(Filed November 4, 1981)

Upon suggestion of counsel, the court enters this order correcting and clarifying its order of October 30,1981. In the last paragraph of the order, starting on page two, "to proceed with an execution sale against the .1% interest of Robert C. Willey's interest in these properties" should be corrected to read "to proceed with garnishment or other appropriate legal proceedings against the .1% interest of Robert C. Willey in these various properties."

SO ORDERED THIS 2nd day of November, 1981.

/ S /

UNITED STATES DISTRICT JUDGE

plaintiff and judgment creditor, Grenada Bank, asserts that the recordation of its judgment in the various counties where these limited partnerships are doing business is sufficient to defeat the claims of a third party purchaser (Day and Apperson) without further judicial proceedings.

It is to be noted that the judgment debtor, Robert W. Willey, Sr., was not a general partner but, rather, was a limited partner. His name did not appear on the warranty deeds conveying the various pieces of real property to the limited partnerships. Unquestionably, the interest of Robert Willey, Sr., in the partnership was personal property. *See* Section 79-13-37, Mississippi Code Annotated of 1972. Therefore, in this diversity action, this court is bound by the applicable Mississippi law.

In *Simmons-Belk, Inc. v. May,* 283 So. 2d 592 (Miss. 1973), the court held that the enrollment or recording of a judgment creates only a general lien as to personalty and a third party purchaser of personalty from a judgment debtor acquires the property free of the claims of a judgment creditor unless a specific lien has been perfected against such property by proper process.

It is to be further noted that Mr. Willey's interest in the partnership was not only personal property, but *intangible* personal property. Again, the Supreme Court of Mississippi, in *Simmons-Belk, Inc. v. May,* supra, recognized that the lien on an enrolled judgment does not attach to intangible personal property such as an obligation of a promissory note and that garnishment of the obligor is the proper process.

Accordingly, the court revokes its prior order of August 31, 1981, directing the United States Marshal to conduct a public sale of Mr. Willey's 47% interest in the five Mississippi limited partnerships owned by him without prejudice to the plaintiff-judgment creditor, Grenada Bank, to proceed with an execution sale against the .1% interest of Robert C. Willey's interest in these various properties.

ORDERED this 30th day of October, 1981.

/ S /

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GRENADA BANK, a Mississippi Corporation, d/b/a COAHOMA BANK, *Plaintiff,*	)	
v.	)	NO. DC80-32-LS-O
ROBERT WILLEY, SR., et al., *Defendants.*	)	

ORDER ALLOWING INTERVENTION OF DAY AND APPERSON AND REVOKING PRIOR ORDER DIRECTING SALE

(Filed November 2, 1981)

This cause came on to be heard on the motion of Clarence C. Day and Lawson F. Apperson to intervene in this cause pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and the parties having agreed that the court will hear and determine the motion to intervene together with the merits of the claims of the intervenors, finds as follows:

The applicants for intervention, Clarence C. Day and Lawson F. Apperson, claim an interest relating to the property which is the subject of this action and they are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest, and their interest is not adequately represented by existing parties. Therefore, the court permits Clarence C. Day and Lawson F. Apperson to intervene in this cause.

As to the merits of their claims in this cause, the court finds that the judgment debtor herein, Robert Willey, Sr., was a limited partner in certain limited partnerships in Northeast Mississippi and that the

No. 82-1738

In the Supreme Court of the United States

October Term, 1982

GRENADA BANK, A Mississippi Corporation,
DBA "COAHOMA BANK",
Petitioner,

VS.

ROBERT WILLEY, SR., ET AL.,
Respondents,

VS.

CLARENCE C. DAY and
LAWSON F. APPERSON,
Intervenors/Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out of postjudgment efforts by the Petitioner, Grenada Bank, to satisfy two judgments against Robert Willey, Sr. ("Willey"), obtained in the U.S. District Court for the Northern District of Mississippi. One judgment for $164,975.00 was obtained on September 25, 1980 and one for $104,883.08 on July 17, 1981.

There is no dispute as to the facts.

Prior to June 3, 1981, Willey owned a 47% interest in five partnerships formed under the Mississippi Uniform Limited Partnership laws and a 41% interest in a partnership formed under the Tennessee Uniform Limited Partnership laws ("Partnerships"). Each Partnership was

formed for the purpose of building an apartment complex under rent subsidy programs established by the United States Government wherein the Department of Housing and Urban Development would insure mortgage loans on the projects. Five projects were to be built in Mississippi and one in Tennessee.

On June 3, 1981, Intervenors/Respondents, Clarence Day and Lawson Apperson, acquired an aggregate 99.7% ownership interest in each of said Partnerships through the execution of Subscription Agreements and Amended and Restated Partnership Agreements for each Partnership. These agreements obligated Intervenors/Respondents to contribute an aggregate of One Million Dollars directly to the Partnerships and the Amended and Restated Partnership Agreements restated the ownership interest of each Partnership vesting in Intervenors/Respondents an aggregate 99.7% ownership in each Partnership and reducing Willey's interest to .01% in each Partnership.

Each Amended and Restated Partnership Agreement granted unto Mr. Apperson, as majority general partner, the right to terminate Willey's remaining .01% interest in the Partnership, for a consideration of $1.00, without cause, upon final endorsement by the Department of Housing and Urban Development of each Partnership apartment project.

Subsequent to the postjudgment proceedings all projects were completed and endorsed by the Department of Housing and Urban Development and Willey's .01% interest in each Partnership has heretofore been terminated.

On June 29, 1981 no process had been instituted by Petitioner against the Partnership interests of Willey and Intervenors/Respondents were not aware of the judgments against Willey. By said date Intervenors/Respondents had contributed the aggregate subscription price of One Million ($1,000,000.00) Dollars to the Partnerships in the form of

Four Hundred Thousand ($400,000.00) Dollars cash and Six Hundred Thousand ($600,000.00) Dollars in negotiable promissory notes. These sums were used to provide funding for construction of the apartment complexes by the respective Partnerships.

Realignment of the ownership interests were effective June 3, 1981 upon execution of the Amended and Restated Partnership Agreements although the agreements were not recorded in the appropriate county office until early September, 1981.

On July 29, 1981, Petitioner began its attempts to satisfy its judgments against Willey, eventually seeking judicial sale of his purported 47% interest in each Mississippi Partnership and his 41% interest in the Tennessee Partnership.

Petitioner's actions as to the Mississippi Partnerships was commenced in the U.S. District Court for the Northern District of Mississippi and the action against the Tennessee Partnership was commenced in the U.S. District Court for the Western District of Tennessee. The course of procedure in each court was substantially identical. The writ of execution sought to be used by Petitioner in each Court was a writ of fieri facias, a direction to the Marshall to seize the Partnership interests. The writ was served by mail on Mr. Willey, and was not served upon the respective Partnerships.

Upon hearing of Petitioner's attempted judicial sale of these interests, Intervenors/Respondents sought, and were permitted, to intervene in the proceedings in the U.S. District Court for the Northern District of Mississippi and in the U.S. District Court for the Western District of Tennessee.

Both District Courts held in favor of Intervenors/Respondents.

Both District Court decisions were appealed by Petitioner.

The United States Court of Appeals for the Fifth Circuit in an opinion filed December 20, 1982 (reprinted as A-4 to the Appendix to the Petition) affirmed the District Court decision, holding that:

1. Intervenors by executing the Subscription Agreements and the Amended and Restated Partnership Agreements on June 3, 1981 acquired a 99.7% interest in each Partnership; and

2. As to the remaining .01% interest in each of the Mississippi Partnerships owned by Willey at the time of execution, a writ of garnishment, not a writ of fieri facias (a direction to the sheriff to take physical possession of the property) was the proper writ of execution under Mississippi law.

Both the Court of Appeals and the District Court, held that a partnership interest is an intangible and, under Mississippi law, a writ of garnishment served upon the obligor is the proper writ of execution to charge the interest of the Partnership.

The United States Court of Appeals for the Sixth Circuit in an opinion filed April 18, 1983 found that Intervenors/Respondents acquired a 99.7% ownership interest in the Tennessee Partnership directly from the Partnership (not from Willey) on June 3, 1981, and that the interest of Willey was thereupon reduced to .01%. The matter was reversed and remanded in order that appropriate procedures might be taken with respect to the .01% interest in the Tennessee Partnership owned by Willey at the time of execution.

A copy of the written opinion delivered by the United States Court of Appeals for the Sixth Circuit is reprinted as an appendix to this response.

ARGUMENT

In the instant case, two separate United States District Courts and two separate United States Courts of Appeal, in reviewing the identical facts, have determined that at the time Petitioner commenced the postjudgment process, all that the judgment debtor owned was .01% in each of six limited partnerships. The Petition does not question this ruling.

The Petition seeks only to have this Court review the decision of the Court of Appeals as to the appropriate procedure on execution against intangible personal property under the laws of the State of Mississippi.

In addition, the question is moot as the .01% interest of Willey in each Partnership has now been terminated pursuant to the provisions of the Amended and Restated Partnership Agreements.

It is submitted that the issue presented is not an appropriate matter for this Court to review on certiorari and that the Petition should be denied.

Respectfully submitted,

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No. 81-5913

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GRENADA BANK, d/b/a COAHOMA BANK,
Plaintiff-Appellant,

v.

ROBERT WILLEY, SR., et al.,
Defendants,

HUNTINGDON ASSOCIATES, LTD., CLARENCE C. DAY and LAWSON F. APPERSON,
Intervenors-Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 18, 1983

Before: ENGEL and KRUPANSKY, Circuit Judges; and BROWN, Senior Circuit Judge.

KRUPANSKY, Circuit Judge. This is an appeal by Grenada Bank (Bank) from an order entered in the Western District of Tennessee which held that the Bank could not satisfy a judgment against defendant Robert Willey (Willey) through the execution upon, and sale of, Willey's purported 41% interest in a limited partnership because Willey transferred or assigned his interest to Clarence Day and Lawson Apperson (Intervenors) prior to the

time of the attempted execution. The Bank here contends that the sale of the partnership interest by Willey to the Intervenors is void or voidable.

The operative facts were largely a matter of stipulation below. In September, 1980, Willey owned a 38% limited interest and a 2% general interest in Huntingdon Associates, Ltd. (Huntingdon), a Tennessee limited partnership, duly recorded under the laws of that state, which partnership sought to develop HUD/FHA — assisted apartment projects. On September 25, 1980, the Bank obtained a judgment against Willey and others in United States District Court for the Northern District of Mississippi.

Approximately nine months later, in June, 1981, an Amended and Restated Partnership Agreement for Huntingdon was executed whereby the Intervenors infused one million dollars of new capital into Huntingdon and thereby held an aggregate 99.7% partnership interest. This addition of funds and investors reduced Willey's proportional share of ownership from 41% to .1%. The Amended and Restated Partnership Agreement was not, however, immediately recorded.

In July, 1981, the Bank recorded its Mississippi judgment against Willey in Tennessee. Subsequently, Huntingdon recorded the new partnership agreement, reflecting Willey's reduced ownership as a percentage of the total, in the appropriate county office. The Bank thereupon moved for an order directing the sale of Willey's interest in Huntingdon to satisfy the admittedly valid judgment.

At trial, the Intervenors contended that they acquired, by virtue of the revised agreement executed in June, a 99.7% ownership interest in Huntingdon which precluded a sale of 41% of the partnership to satisfy the judgment

against Willey recorded in July, 1981. The Bank argued that the transaction between Willey and the Intervenors (1) was void because government approval for the new partnership was not obtained within sixty days as contemplated by paragraph seven of the Subscription Agreement,[1] executed simultaneously with the Amended and Restated Partnership Agreement and (2) was ineffective as to third persons because the Amended Partnership Agreement, which the Bank characterized as "substituting" the Intervenors for Willey as limited partners, was not immediately recorded. The district judge initially construed the sixty day approval clause as a termination provision, which all parties herein impliedly waived, and not as a condition subsequent to an executory contract. The court further found that registration did not bear upon the right to transfer partnership interests, but went to the right of any unrecorded partner to claim the status of "limited partner."

The present appeal ensued.

---

1. Paragraph seven provides as follows:

> 7. Simultaneously with the execution of this Agreement, Willey, Murley, BCC, Day and Apperson have executed the Amended Certificate and Restated Agreement of Limited Partnership, a copy of which is attached hereto as Exhibit A ("Amended Partnership"). Day and Apperson will promptly submit to HUD/FHA fully completed HUD/FHA Forms 2530, 2013-S and 2417 for approval of Day and Apperson by HUD/FHA as partners, and immediately upon such approval, Murley and Willey will cause the Amended Partnership Agreement to be properly recorded in the Office of the official recorder of each County in each State in which the Partnership is doing business.
>
> If Day and Apperson are not so approved as partners by HUD/FHA within sixty (60) days after the date of this Agreement, then, *Southern shall immediately return all of the considerations referred to in Sections 3 and 4 above unto Day and Apperson,* respectively, and the Amended Partnership and this Agreement shall terminate, be void and of no effect. (Emphasis added).

The Bank would have this Court determine what rights to income or management may validly be assigned or transferred by a limited partner and what disabilities are incurred by the failure to record such transfers or assignments. These inquiries, however, are premature and incorporate a fundamental misperception of the actual legal character of the transaction *sub judice* in that the assignments of error assume, incorrectly, that Willey sold, transferred or assigned his 41% interest in the original Huntingdon partnership to the Intervenors. In fact, Willey did not sell, transfer or assign any interest; rather, the partnership was expanded and reformed by the addition of fresh capital and new investors such that Willey's *continuous* interest in the partnership, expressed as a percentage of total ownership, was reduced from 41% to .1%. This basic conclusion, conceded by the Intervenors before this Court, was not perceived by the district court which based its order denying the Bank's motion for a sale of Willey's interest in Huntingdon upon a finding that the "assignment" or "transfer" of Willey's interest occurred prior to the recording of judgment and so defeated the Bank's claim. Inasmuch as the proper legal characterization of the transaction herein is fully apparent from the stipulated facts and is a matter of law rather than an additional finding of fact, it is not improper to reach this result on appeal without a remand. *Pullman-Standard v. Swint*, ... U.S. ....., 102 S.Ct. 1781 (1982). *See also K & M Joint Venture v. Smith International, Inc.*, 669 F.2d 1106, 1111-12 (6th Cir. 1982).

Viewed in its proper light, the Amended and Restated Partnership Agreement did not remove or destroy assets previously liable to sale in satisfaction of the judgment; rather, the Agreement merely reflected that Willey's continuous interest declined in relative portion to the total value of the partnership. However, inasmuch as the revised agreement had not been filed at the time the Bank's

judgment was recorded in Tennessee, this Court must address the issue of how, if at all, the failure to record the revised partnership agreement effected the right of the Bank to levy against Willey's interest in Huntingdon Associates, Ltd.

Cases construing the Uniform Limited Partnership Act[2] are in accord that a failure to comply with the statutory requirements for establishing a limited partnership, such as recording, does not void the creation of an association between the partners, but does preclude those partners from claiming the status of *limited* partners when dealing with third parties who are without notice of the limited liability due to a failure to record. *Peerless Mills v. American Tel. & Tel. Co.*, 527 F.2d 445, 449, n.1 (2d Cir. 1975) (cases cited therein). In the present case, Willey is a putatively limited partner under the revised agreement. However, inasmuch the new partnership was not recorded in Tennessee at the time the Bank recorded its judgment against Willey, neither Willey nor the Intervenors may here claim that Willey possesses only the status of a limited partner; Willey, for purposes of the Bank's judgment, is a general partner owning .1% of the value of Huntingdon. The Bank, accordingly, may levy against that interest to satisfy its judgment.

The judgment of the district court is hereby REVERSED and the instant cause REMANDED with instructions to enter an appropriate order.

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2. Tennessee is one of 44 jurisdictions which has adopted the Uniform Limited Partnership Act. T.C.A. §§ 61-2-101 to 61-2-103 (effective 1-1-22). As with most jurisdictions which have adopted the Act, Tennessee, by statute, has specifically authorized recourse to judicial opinions from those other jurisdictions utilizing the Act so "as to effect its general purpose to make uniform the law of those states which enact it." T.C.A. § 61-2-127(b). Accordingly, citation to opinions from companion jurisdictions is generally considered persuasive.